

**BEFORE THE**  
**Federal Communications Commission**  
**WASHINGTON, DC**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Section 257 Proceeding to Identify and )  
Eliminate Market Entry Barriers for )  
Small Businesses )

GN Docket No. 96-113

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**REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.**

Tele-Communications, Inc. ("TCI") hereby files these Reply Comments in the above-captioned proceeding.<sup>1</sup> Specifically, TCI responds to the self-serving attempt by Optel, Inc. ("Optel") to use this proceeding as a means to impose competitive handicaps on cable operators.<sup>2</sup> For the reasons set forth below, the Commission should reject Optel's request as: 1) inappropriate for this proceeding; and 2) wholly unsupported as a legal and public policy matter.

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<sup>1</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, 11 F.C.C.R. 6280 (1996) ("Notice").

<sup>2</sup> See Comments of Optel, Inc. in GN Docket No. 96-113 (filed September 27, 1996) ("Optel Comments").

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**I. OPTEL'S REQUEST THAT THE COMMISSION GRANT OPTEL SPECIAL COMPETITIVE PRIVILEGES IS INAPPROPRIATE FOR THIS PROCEEDING.**

Optel's comments urge the Commission to adopt regulations that provide Optel with a special competitive advantage in the market for cable services. Specifically, Optel claims that it is hampered in its ability to enter the market for cable service due to "perpetual" service contracts between cable operators and multiple dwelling units ("MDUs").<sup>3</sup> Thus, Optel proposes that the Commission adopt a "fresh look" policy under which a private cable company, such as Optel, could trigger the reopening of all contracts between cable operators and MDUs in order to allow Optel another opportunity to compete for cable MDU subscribers.<sup>4</sup>

Optel's request is inappropriate for this proceeding. In addition to the fact that Optel's comments are essentially identical to comments it previously filed in a separate proceeding (to which TCI has already responded),<sup>5</sup> Optel's request for special competitive privileges is beyond the proper scope of this proceeding, which is to identify potential market entry barriers to small businesses. Optel claims that cable MDU contracting practices impede competition generally in the MDU

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<sup>3</sup> Optel Comments at 5-7.

<sup>4</sup> Id. at 7-9.

<sup>5</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133 (released June 13, 1996); Comments of Optel, Inc. (filed July 19, 1996) & Reply Comments of Tele-Communications, Inc. (filed August 19, 1996).

marketplace. Aside from the fact that this claim is belied by marketplace realities as described in Section II below, Optel makes no attempt to demonstrate how these contracts impose a particular burden on small business entities. For this reason alone, the Commission should disregard Optel's comments.

**II. OPTEL'S SELF-SERVING REQUEST THAT THE COMMISSION USE THE SECTION 257 PROCESS TO NULLIFY CONTRACTS BETWEEN CABLE OPERATORS AND MDUS IS UNJUSTIFIED AS A LEGAL AND PUBLIC POLICY MATTER.**

Even if Optel's comments were germane to this proceeding, Optel's proposal is unsupported by marketplace facts and is wholly unjustified as a legal and policy matter. Contrary to Optel's assertion, there is no such thing as a perpetual MDU contract. As with all contracts, the term of a cable operator-MDU service agreement is the product of open negotiations between the parties. This freely negotiated term is often for the life of the cable operator's franchise. However, contrary to Optel's assertion, a term for "the life of the franchise" does not include any automatic renewals or extensions of that franchise. Rather, the MDU manager is free to renegotiate the cable service contract at the end of the existing franchise term.<sup>6</sup> The fact that MDU managers often choose to automatically renew their agreements with cable operators reflects their satisfaction with

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<sup>6</sup> In addition, even where a contract has a clause which provides for automatic renewal if neither party takes affirmative action, such a clause in no way prevents the MDU manager from exercising its express option to renegotiate or terminate the agreement.

their cable service, rather than any coercion on the part of the cable operator.

Optel attaches to its comments MDU contracts with language indicating that the contracts terminate when the franchise terminates. Cable operators often structure MDU termination dates in this manner because their authority to provide cable service ends when the franchise ends. Optel contends that this structure somehow converts the MDU contracts into "perpetual" obligations. This argument clearly has no merit. Because a franchise is not perpetual, and because MDU contracts end when the franchise ends, by definition MDU contracts are not perpetual. Even if the franchise is subject to an automatic renewal, this does not sustain Optel's argument. First, as noted above, in such instances, the MDU owner has the right to renegotiate or terminate the contract. Second, the fact that a contract can be renewed does not mean that it can be enforced in perpetuity.

In addition, Optel's attempt to use this Section 257 proceeding as a means to impose greater regulatory handicaps on cable operators in the MDU marketplace ignores the fact that both Congress and the Commission have recognized that the MDU marketplace is a uniquely dynamic environment in which the cable operator faces direct and vigorous competition.<sup>7</sup> Both MMDS and

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<sup>7</sup> See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (recognizing that discounted offerings to MDUs by cable operators are necessary due to the presence of other providers offering the same service); Implementation of Sections (continued . . .)

SMATV operators have long tailored their service offerings to MDU subscribers, engaging in highly aggressive marketing and pricing strategies designed to keep cable operators out of the MDU marketplace.<sup>8</sup> In addition, DBS operators have ambitiously targeted the MDU market.<sup>9</sup> As a result, Congress specifically allowed cable operators greater pricing flexibility in order to meet the lower prices created by the high level of MDU competition.<sup>10</sup> In short, far from finding any competitive problem in the MDU marketplace caused by cable operator contracting practices, Congress found that cable operators need greater flexibility to compete in this vigorously competitive arena.

Seen in this light, Optel's proposal amounts to little more than an audacious request that the Commission use its authority under Section 257 to rig the MDU contract bidding process in Optel's favor. Under Optel's preferred scenario, Optel and a

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(continued . . .)  
of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, ¶ 20 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems").

<sup>8</sup> See "Latest Battleground: Cable Fighting For MDUs," Multichannel News, July 17, 1995, p. 16.

<sup>9</sup> See "DBS Makers Target MDUs," Multichannel News, March 4, 1996, p. 5 (describing industry-wide DBS efforts to compete in the MDU market).

<sup>10</sup> See 47 U.S.C. § 623(d), amended by section 301(b) (2) of the 1996 Act.

cable operator would bid for the right to serve an MDU, but if Optel bids too high and the cable operator wins the contract, Optel would have the Commission ignore this market result and nullify any contracts between the MDU owner and the cable operator so as to afford Optel a chance to bid again. In essence, Optel is asking the Commission to abandon reliance on market forces and delay service to subscribers for Optel's private benefit. There is nothing in Section 257, Title VI, or in any of the Commission's prior decisions to suggest that the Commission could or should adopt such an extreme, unsupported, and unnecessary proposal.<sup>11</sup> Thus, Optel's baseless plea for a

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<sup>11</sup> While the Commission has adopted a "fresh look" policy in the past to revise existing contracts, those instances have always concerned the regulation of Title II common carriers and have been limited to situations where the contracts in question had been rendered unreasonable or illegal due to a change in regulatory policy. Thus, Optel's attempt to apply this policy outside of the Title II context to reasonable, freely negotiated contracts, and where no such change in regulatory policy has occurred, is unjustified. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 & 95-185, FCC 96-325, ¶ 1095 (released August 8, 1996) (finding that certain LEC-CMRS interconnection contracts violate Commission rules, and therefore allowing CMRS providers to revise such contracts in order to implement the mutual compensation rules required by the 1996 Act); Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order on Recon., 7 F.C.C.R. 7369, 7463-7465 (1992) (imposing "fresh look" requirements in order to allow customers bound by long-term contracts to enforce the Commission's prescribed termination rates); Competition in the Interstate Interexchange Marketplace, Report and Order and NPRM, 7 F.C.C.R. 2677, 2681-82 (1992) (allowing a "fresh look" at any contracts which violated Commission rules by bundling 800 services with interexchange offerings).

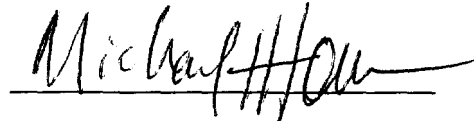
"second chance" policy for MVPDs which are disinclined to compete in the MDU video marketplace without a substantial regulatory advantage should be rejected.

#### **CONCLUSION**

For the foregoing reasons, TCI respectfully urges the Commission to reject Optel's proposal. Optel's proposal is inappropriate for this proceeding in that it makes no effort to demonstrate (or even suggest) that the cable contracts about which it complains impose a particular burden on small businesses. Even if Optel's comments were germane to this proceeding, Optel's proposal is unsupported by marketplace facts and is wholly unjustified as a legal and policy matter.

Respectfully submitted,

**TELE-COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read "Michael H. Hammer", written over a horizontal line.

Michael H. Hammer  
Todd G. Hartman

**WILLKIE FARR & GALLAGHER**  
Three Lafayette Centre  
1155 21st Street, N.W.  
Suite 600  
Washington, DC 20036-3384  
(202) 328-8000

Their Attorneys

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